Woo Wei Liang v Liang Dinghui (suing as administrator of estate of Woo Wei Kwang, deceased)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCvC)-519–03 OF 2021
NOR BEE ARIFFIN, HADHARIAH SYED ISMAIL AND MARIANA YAHYA JJCA
8 AUGUST 2022

Succession — Administration — Executor — Appellant sought for revocation of grant of probate for estates and to be appointed as executor or administrator de bonis non in respect of estates — High Court dismissed appellant's application — Whether issue of delay was relevant — Whether questions posed were fit to be determined summarily without trial — Whether testators devised scheme of representation to administer estates — Whether s 12 of Probate and Administration Act 1959 was applicable — Probate and Administration Act 1959, s 12

These consolidated actions ('Suit 417' and 'Suit 418') related to the estates of Cheng How Ching ('CHC') and Woo Teh Shan ('WTS') who were husband and wife. They both died testate and they appointed their son, Woo Wei Kwang ('WWK') as the executor of their respective wills. They also appointed their eldest son, the appellant, as the alternate or substituted executor if WWK was unwilling or unable to act for whatever reason. This was provided for in cl 2 of their respective wills. WWK extracted and obtained the grant of probate for both estates. The appellant claimed that WWK failed to administer and distribute the assets in the estates and commenced a legal action to remove WWK as the executor of the estates. However, WWK passed away and the respondent was the executor of WWK's will. The appellant claimed that upon the passing of WWK, as the alternate or substitute executor under the estates based on the scheme of representation provided for in the two wills, he was the executor of the estates. The respondent claimed that as the executor of WWK's estate, he was also the executor of the estates based on a chain of executorship provided under s 12 of the Probate and Administration Act 1959 ('the Act') as WWK was the original executor for the estates before he died. To resolve the matter, the appellant and the respondent executed a settlement agreement which provided, inter alia, that the respondent would not object to the appellant's application to replace WWK as the executor to the estates. The appellant claimed that the respondent breached the settlement agreement by continuing to hold himself out as the executor of the estates. Thus, the appellant filed Suit 417 in respect of CHC's estate and Suit 418 in respect of WTS's estate. The reliefs sought in both suits were, inter alia, the revocation of the grant of probate for the estates and for the appellant to be appointed as the

executor or administrator de bonis non in respect of both estates. In Suit 417, the appellant filed an application under O 14A r 1 and/or O 33 r 2 and/or r 5 of the Rules of Court 2012 ('the ROC') in encl 211 for the determination by the court on questions of law. The questions, inter alia, were: (a) Question 1: Whether in law the last wills and testaments of WTS and CHC respectively evinced an intention by both testators to create a scheme of representation whereby the appellant was to be appointed as the alternate/substitute executor of the estates where the first name executor WWK had passed away and was unable to act as executor to commence and to complete the administration and distribution of the estates; and (b) Question 2: Whether in law the chain of executorship as provided for in s 12 of the Act could be applied by the respondent to the estates where the first named executor, WWK, had deceased before commencing and completing the administration and distribution of the estates, thereby entitling the lawful and duly appointed executor of WWK, the respondent to act as the executor and to administer and distribute the estates notwithstanding the naming of the appellant as the alternate/substitute executor in the last wills and testaments of WTS and CHC respectively. The High Court dismissed encl 211 as not being a fit and proper case for an O 14A application and the application was made too late in the day. Hence, this appeal.

Held, allowing the appeal in part:

(1) The issue of delay was irrelevant as encl 211 made reliance not only on O 14A r 1 but also on O 33 r 2 and/or r 5 of the ROC where the application may be made either before, at or after the trial. The O 14A application in encl 211 may be made at any stage of the proceedings. The learned judge should not have rejected the O 14A application by reason of delay. Even if the learned judge had found that O 14A was not the appropriate mode to pose the four questions, encl 211 still could not be rejected in light of the reliance made on O 33 r 2 and r 5 of the ROC (see paras 45 & 48).

(2) Questions 1 and 2 raised significant issues which should be determined first and foremost. The learned judge erred when holding that Questions 1 and 2 involved mostly questions of facts. The appellant's suitability as an executor and the conduct of the parties during WWK's administration of the estates of WTS and CHC were not relevant to the determination of Question 1. The suitability of the appellant as the alternative executor was not a condition or additional requirement imposed by the testators in their wills. The learned judge had thus factored in irrelevant consideration. The construction of the wills of WTS and CHC in relation to Question 1, was a question of law for determination by the court and not by witnesses through their oral evidence unless it could be shown that there were also disputes as to the 'factual matters' affecting the point of construction. The High Court fell into an erroneous finding that

Questions 1 and 2 were not fit to be determined summarily without a trial. It was incumbent on him to determine Question 1 by looking at the wills (see paras 50, 54–55 & 63).

(3) The language in cl 2 of the wills was plain, simple, clear and unambiguous. The court must gave the words in cl 2 their natural and ordinary meaning to enable the testators' intentions. Clause 2 must be construed to be an express declaration of the intention by CHC and WTS to appoint WWK as the instituted executor and the appellant as the substitute executor if WWK was 'unable to act for whatever reason' which included the death of WWK. So when WWK died, the intention of the testators that they wanted their other son, the appellant, to be the substitute executor, must be put into effect. There could be little doubt that when the testators made the wills, they both had in mind their sons as the executors and had intended to devise a scheme of representation among their sons, to appoint only their sons to administer their estates and nobody else. The condition for the appellant's appointment had arisen and had been satisfied. The naming of the appellant as the substituted executor did automatically translate into his suitability to assume such role to manage the estates of CHC and WTS. The position taken by the respondent was clearly against the clear and express intention of CHC and WST in their wills. Question 1 was therefore answered in the affirmative (see paras 72 & 74–76).

(4) For the respondent to claim the application of s 12(1) of the Act, the respondent must show that WWK was the sole or last surviving executor of the wills. WWK however, was not the sole or last surviving executor of the testators. The wills provided for the appointment of the appellant as a substitute executor. The appellant was willing and able to act as the substitute executor. Thus, the learned judge erred in holding that the issue of the applicability of s 12(1) of the Act and the chain of executorship was unsettled and in dispute. So long as there was a clear scheme of representation, that scheme of representation must be given effect to and shall prevail over any claim for chain of representation. In any event, the respondent could not rely on s 12 of the Act as it was not applicable here. Question 2 was answered in the negative (see paras 78–80).

[Bahasa Malaysia summary

Tindakan yang disatukan ini ('Guaman 417' dan 'Guaman 418') berkaitan dengan harta pusaka Cheng How Ching ('CHC') dan Woo Teh Shan ('WTS') yang merupakan suami isteri. Mereka berdua meninggal dunia dengan wasiat dan mereka melantik anak lelaki mereka, Woo Wei Kwang ('WWK') sebagai pelaksana wasiat masing-masing. Mereka juga melantik anak sulung mereka, perayu, sebagai pelaksana gantian atau pengganti jika WWK tidak mahu atau tidak dapat bertindak atas apa jua sebab. Ini diperuntukkan dalam klausa 2

wasiat masing-masing. WWK mengekstrak dan memperoleh pemberian probet untuk kedua-dua harta pusaka. Perayu mendakwa WWK gagal mentadbir dan mengagihkan aset harta pusaka dan memulakan tindakan undang-undang untuk memecat WWK sebagai pelaksana harta pusaka. Walau bagaimanapun, WWK meninggal dunia dan responden adalah pelaksana wasiat WWK. Perayu mendakwa bahawa apabila WWK meninggal dunia, sebagai pelaksana gantian atau pengganti di bawah harta pusaka berdasarkan skema representasi yang diperuntukkan dalam kedua wasiat, beliau adalah pelaksana harta pusaka. Responden mendakwa bahawa sebagai pelaksana harta pusaka WWK, beliau juga pelaksana harta pusaka berdasarkan rantaian pelaksanaan yang diperuntukkan di bawah s 12 Akta Probet dan Pentadbiran 1959 ('Akta') kerana WWK adalah pelaksana asal bagi harta pusaka sebelum beliau meninggal dunia. Untuk menyelesaikan perkara itu, perayu dan responden telah melaksanakan perjanjian penyelesaian yang memperuntukkan, antara lain, bahawa responden tidak akan membantah permohonan perayu untuk menggantikan WWK sebagai pelaksana harta pusaka. Perayu mendakwa bahawa responden melanggar perjanjian penyelesaian dengan terus menyatakan dirinya sebagai pelaksana harta pusaka. Oleh itu, perayu memfailkan Guaman 417 berkenaan dengan harta pusaka CHC dan Guaman 418 berkenaan dengan harta pusaka WTS. Relif yang dipohon dalam kedua-dua Guaman ialah, antara lain, pembatalan pemberian probet untuk harta pusaka dan perayu untuk dilantik sebagai pelaksana atau pentadbir de bonis non berkenaan dengan kedua-dua harta pusaka. Dalam Guaman 417, perayu memfailkan permohonan di bawah A 14A k 1 dan/atau A 33 k 2 dan/atau k 5 Kaedah-Kaedah Mahkamah 2012 ('KKM') dalam lampiran 211 untuk penentuan oleh mahkamah atas persoalan undang-undang. Soalan-soalan, antara lain, adalah: (a) Soalan 1: Sama ada dalam undang-undang wasiat terakhir WTS dan CHC masing-masing membuktikan hasrat kedua-dua pewasiat untuk mewujudkan skema representasi di mana perayu akan dilantik sebagai pengganti/gantian pelaksana harta pusaka di mana pelaksana nama pertama WWK telah meninggal dunia dan tidak dapat bertindak sebagai pelaksana untuk memulakan dan menyempurnakan pentadbiran dan pengagihan harta pusaka; dan (b) Soalan 2: Sama ada dalam undang-undang rantaian pelaksanaan seperti yang diperuntukkan dalam s 12 Akta boleh digunakan oleh responden untuk harta pusaka di mana pelaksana yang pertama dinamakan, WWK, telah meninggal dunia sebelum memulakan dan menyempurnakan pentadbiran dan pengagihan harta pusaka, dengan itu melayakkan pelaksana WWK yang sah dan dilantik dengan sewajarnya, responden bertindak sebagai pelaksana dan mentadbir dan mengagihkan harta pusaka walaupun perayu dinamakan sebagai pelaksana pengganti/gantian dalam wasiat terakhir WTS dan CHC masing-masing. Mahkamah Tinggi menolak lampiran 211 kerana tidak sesuai dan wajar bagi permohonan A 14A dan permohonan itu dibuat terlalu lewat. Oleh itu, rayuan ini.

A B C D E F G H I

Diputuskan, membenarkan sebahagian rayuan:

(1) Isu kelewatan adalah tidak relevan kerana lampiran 211 bergantung bukan sahaja pada A 14A k 1 tetapi juga pada A 33 k 2 dan/atau k 5 KKM di mana permohonan boleh dibuat sama ada sebelum, pada atau selepas perbicaraan. Permohonan A 14A dalam lampiran 211 boleh dibuat pada mana-mana peringkat prosiding. Hakim yang bijaksana tidak sepatutnya menolak permohonan A 14A kerana kelewatan. Walaupun hakim yang bijaksana telah mendapati bahawa A 14A bukanlah cara yang sesuai untuk mengemukakan soalan, lampiran 211 masih tidak boleh ditolak memandangkan pergantungan yang dibuat pada A 33 k 2 dan k 5 KKM (lihat perenggan 45 & 48).

(2) Soalan 1 dan 2 menimbulkan isu penting yang harus ditentukan terlebih dahulu. Hakim yang bijaksana telah terkhilaf apabila memutuskan bahawa Soalan 1 dan 2 kebanyakannya melibatkan soalan fakta. Kesesuaian perayu sebagai pelaksana dan kelakuan pihak-pihak semasa WWK mentadbir harta pusaka WTS dan CHC tidak relevan dengan penentuan soalan 1. Kesesuaian perayu sebagai pelaksana alternatif bukanlah syarat atau keperluan tambahan yang dikenakan oleh pewasiat dalam wasiat mereka. Oleh itu, hakim yang bijaksana telah mengambil kira pertimbangan yang tidak relevan. Pembentukan wasiat WTS dan CHC berhubung Soalan 1, adalah persoalan undang-undang untuk penentuan oleh mahkamah dan bukan oleh saksi melalui keterangan lisan mereka melainkan dapat ditunjukkan bahawa terdapat juga pertikaian mengenai 'perkara fakta' menjejaskan perkara pembentukan. Mahkamah Tinggi membuat penemuan yang salah bahawa Soalan 1 dan 2 tidak sesuai untuk ditentukan secara terus tanpa perbicaraan. Ia menjadi kewajipan untuk menentukan Soalan 1 dengan melihat wasiat (lihat perenggan 50, 54–55 & 63).

(3) Bahasa dalam klausa 2 wasiat adalah mudah, ringkas, nyata dan jelas. Mahkamah mesti memberikan perkataan dalam klausa 2 makna semula jadi dan biasa untuk membolehkan niat pewasiat. Klausa 2 mesti ditafsirkan sebagai pengisytiharan nyata tentang hasrat oleh CHC dan WTS untuk melantik WWK sebagai pelaksana nyata dan perayu sebagai pelaksana gantian jika WWK 'tidak dapat bertindak atas apa jua sebab' termasuk kematian WWK. Jadi apabila WWK meninggal dunia, niat pewasiat bahawa mereka mahu anak lelaki mereka yang lain, perayu, menjadi pelaksana gantian, mesti dilaksanakan. Tidak diragukan bahawa apabila pewasiat membuat wasiat, mereka berdua memikirkan anak lelaki mereka sebagai pelaksana dan telah berhasrat untuk merangka skema representasi di kalangan anak lelaki mereka, untuk melantik hanya anak lelaki mereka untuk mentadbir harta pusaka mereka dan bukan orang lain. Syarat pelantikan perayu telah timbul dan telah dipenuhi. Penamaan perayu sebagai pelaksana gantian secara automatik memberi

makna kesesuaiannya untuk mengambil alih peranan tersebut untuk menguruskan harta pusaka CHC dan WTS. Pendirian yang diambil oleh responden jelas bertentangan dengan niat jelas dan nyata CHC dan WST dalam wasiat mereka. Oleh itu, Soalan 1 telah dijawab secara afirmatif (lihat perenggan 72 & 74–76).

(4) Bagi responden menuntut permohonan s 12(1) Akta, responden mesti menunjukkan bahawa WWK adalah pelaksana tunggal atau terakhir wasiat yang masih hidup. Walau bagaimanapun, WWK bukanlah satu-satunya atau pelaksana terakhir wasiat yang masih hidup. Wasiat itu diperuntukkan untuk pelantikan perayu sebagai pelaksana gantian. Perayu sanggup dan mampu bertindak sebagai pelaksana pengganti. Oleh itu, hakim yang bijaksana terkhilaf apabila memutuskan bahawa isu kebolehgunaan s 12(1) Akta dan rantaian pelaksanaan tidak diselesaikan dan dalam pertikaian. Selagi terdapat skema representasi yang jelas, skema representasi itu mesti dikuatkuasakan dan akan mengatasi sebarang tuntutan untuk rantaian pelaksanaan. Walau apa pun, responden tidak boleh bergantung pada s 12 Akta kerana ia tidak terpakai di sini. Soalan 2 dijawab secara negatif (lihat perenggan 78–80).]

Cases referred to

Asiapools (M) Sdn Bhd v IJM Construction Sdn Bhd [2010] 3 MLJ 7, CA (refd)
Bahamas International Trust Co Ltd and another v Threadgold [1974] 3 All ER 881, HL (refd)
Chong Chieng Jen v Government of State of Sarawak & Anor [2019] 3 MLJ 300; [2019] 1 CLJ 329, FC (folld)
Daud bin Arshad & Ors (representing 61 settlers/participants of FELCRA Gugusan Sungai Ara, Mukim Ulu Sungai Sedili, Daerah Kota Tinggi, Johor) v FELCRA Bhd [2019] 2 MLJ 33, CA (refd)
Dayapi Holdings Sdn Bhd & Anor v Arab-Malaysian Finance Bhd & Anor [2009] 7 MLJ 627, HC (refd)
Director of Forests, Sarawak & Anor v Racha ak Urud @ Peter Racha Urud & Ors and other appeals [2017] 4 MLJ 42, FC (refd)
Estate of CLAMP (dec'd), Re [2014] NZHC 540, HC (folld)
Federal Insurance Co v Nakano Singapore (Pte) Ltd [1991] 2 SLR(R) 390, CA (refd)
Hsu Yik Chai v Hsu Yaw Tang & Anor [1982] 2 MLJ 227; [1982] 1 MLRA 319, FC (refd)
Kalwant Singh a/l Ujagar Singh & Anor v Jaswant Kaur a/p Ujagar Singh & Ors [2022] 3 MLJ 184; [2022] 4 MLRA 27, FC (refd)
Mc Kenzie et al and Mc Kenzi Cv No 4703 of 2010, HC (refd)
Mohd Afrizan bin Hussain v Thein Hong Teck & Ors and another appeal [2017] 4 MLJ 633, CA (refd)
NVJ Menon v The Great Eastern Life Assurance Co Ltd [2004] 3 MLJ 38, CA (refd)

A *Pentadbir Tanah Daerah, Pontian & Ors v Ossons Ventures Sdn Bhd* [2009] 6 MLJ 182, CA (refd)
Thein Hong Teck & Ors v Mohd Afrizan bin Husain and another appeal [2012] 2 MLJ 299, FC (refd)
Tob Weng Keong & Anor v Tob Chee Hoong [2019] MLJU 1435; [2019] 10 CLJ
B 150, CA (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 314
Probate and Administration Act 1959 s 3(1), 12, 12(1)
C Protection of Personal and Property Rights Act 1988 [NZ]
Rules of Court 2012 O 14A, r 1, 1(1)(b), O 33 r 2, r 5
Rules of the High Court 1980 O 14A

Appeal from: Civil Suit No WA-22NCVC-417–07 of 2018 (High Court,
D Kuala Lumpur)

Steven Thiru (with Wong Suk May, Gerard Lourdesamy, David Ng and Ananthan Moorthi) (Gerard Samuel & Assoc) for the appellant.
Suaran Singh Sidhu (Law Partnership) for the respondent.

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Nor Bee Ariffin JCA:

INTRODUCTION

F **[1]** The actions in WA-22NCVC-417–07 of 2018 ('Suits 417') and WA-22NCVC-418–07 of 2018 ('Suit 418') relate to the estates of Cheng How Ching ('CHC') and Woo Teh Shan ('WTS'). These are consolidated actions.

[2] WTS and CHC were husband and wife. They both died testate. They
G appointed their son Woo Wei Kwang ('WWK') as the executor of their respective wills. They appointed their eldest son, the appellant, as the alternate or substituted executor if WWK was unwilling or unable to act for whatever reason. WWK extracted the grant of probate for both estates.

H **[3]** When WWK passed away, the appellant said he should be the executor of his parents' estates as that was the intention of his late parents. The respondent who is the executor of WWK's will, claimed that by the chain of representation as envisaged in s 12 of the Probate and Administration Act (Act 97), he should be the executors for the estates of CHC and WTS. In Suit 417,
I the appellant filed an application under O 14A r 1 and/or O 33 r 2 and/or r 5 of the Rules of Court 2012 ('the ROC') in encl 211 for the determination by the court on four questions of law, the primary issue being which is to prevail, the scheme of representation created by the testators or the chain of representation pursuant to s 12 of Act 97.

BACKGROUND FACTS

[4] The appellant is the eldest son of the late CHC and WTS.

[5] The appellant had a younger brother Woo Wei Kwang ('WWK') and a sister Woo Su May ('WSM').

[6] WTS died testate on 11 September 2011. His last will and testate ('will') was dated 26 April 2017.

[7] CHC passed away testate on 14 December 2015. Her will and testate ('will') was also dated 26 April 2017.

[8] Both CHC and WTS had appointed WWK as the executor of their estates and the appellant as the alternate executor if WWK is unwilling or unable to act for whatever reason. This is provided for in cl 2 of their respective will's.

[9] WSM died testate on 1 November 2015. She appointed the appellant as the executor of her estate.

[10] WWK obtained the grant of probate for WTS's estate and CHC's estate on 26 October 2016.

[11] However, the appellant claimed that WWK failed to administer and distribute the assets in the estates of WTS and CHC.

[12] The appellant then commenced a legal action Originating Summons No WA-24NCVC-1512–09 of 2017 at Kuala Lumpur High Court on 15 September 2017 (OS 1512) to remove WWK as the executor of WTS' estate. At the same time the appellant said that he intended to also file a separate action to remove WWK as the executor of CHC's estate. That did not happen as WWK died on 10 October 2017.

[13] WWK died testate. His will was dated 26 April 2016. The respondent is the executor of WWK's will.

[14] The respondent obtained the grant of probate for WWK's estate on 8 June 2018.

[15] The appellant claimed that upon the passing of WWK, as the alternate or substitute executor under WTS's estate and CHC's estates based on the scheme of representation provided for in the two wills, he is the executor of his parents' estates.

[16] The respondent claimed that as the executor of WWK's estate, he is also the executor of WTS's estate and CHC's estate based on a chain of executorship provided under s 12 of the Act 97. This is because WWK was the original executor for the estates before his death.

[17] To resolve the matter, the appellant and the respondent executed a settlement agreement dated 29 November 2017 (settlement agreement) which provided, inter alia, that the respondent would not object to the appellant's application to replace WWK as the executor to the estates of WTS and CHC.

[18] Pursuant to the settlement agreement, the appellant withdrew the OS 1512 and also did not proceed to remove WWK as the executor of CHC's estate.

[19] The appellant claimed that the respondent breached the settlement agreement by continuing to hold himself out as the executor of the estates of WTS and CHC.

[20] Thus the appellant filed Suit 417 in respect of CHC's estate and Suit 418 in respect of WTS's estate.

[21] The relief sought in both suits are, inter alia, the revocation of the grant of probate for the estates of WTS and CHC to WWK and for the appellant to be appointed as executor or administrator *de bonis non* in respect of both estates.

[22] The respondent had filed a counterclaim against the appellant and his wife Wong Mee Mee (WMM).

[23] The High Court dismissed encl 211. Hence this appeal.

ENCLOSURE 211

[24] The four questions of law posed in this application are:

Question 1

Whether in law the last wills of the testates of Woo Teh Shan ('WTS') and Cheng How Ching ('CHC') dated 26 April 2007 respectively evince an

intention by both testators to create a scheme of representation whereby Woo Wei Liang ('WWL') the plaintiff is to be appointed as the alternate/substitute executor of the estates of WTS and CHC where the first named executor Woo Wei Kwang ('WWK') has passed away and is unable to act as executor to commence and to complete the administration and distribution of the estates of WTS and CHC.

Question 2

Whether in law the chain of executorship as provided for in s 12 of the Probate and Administration Act 1959 can be applied by Liang Dinghui ('LDH') the defendant to the estates of WTS and CHC where the first named executor WWK has deceased before commencing and completing the administration and distribution of the estates of WTS and CHC, thereby entitling the lawful and duly appointed executor of WWK, the defendant to act as executor and to administer and distribute the estates of WTS and CHC notwithstanding the naming of the plaintiff as the alternate/substitute executor in the last wills and testates of WTS and CHC dated 26 April 2007 respectively.

Question 3

Whether in law the handwritten document executed on 29 November 2017 between the plaintiff and the defendant is a valid, binding and enforceable contract between the parties in full and final settlement of their mutual claims and disputes in relation to the estates of WTS, CHC and WWK.

Question 4

If the answers to paras (a), (b) and (c) of encl 211 are favourable to the plaintiffs whether the reliefs sought by the plaintiff at paras 61 (a) to (u) of the re-amended statement of claim dated 6 March 2019 under Suit No WA-22NCVC-417–07 of 2018 ('Suit 417') and at paras 73 (a) to (q) of the re-amended statement of claim dated 6 March 2019 under Suit No WA-22NCVC-418–07 of 2018 ('Suit 418') ought to be allowed by this honourable court and the defendant's counterclaim in both actions as referred to above be dismissed.

THE PROCEEDINGS IN THE HIGH COURT

[25] The High Court dismissed encl 211 as not being a fit and proper case for an O 14A application for the following reasons.

[26] On account of delay, the application was made too late in the day. The action was filed in 2018. There have been too many interlocutory applications filed by the parties culminating into too many case managements to be conducted with appeals made to the Court of Appeal from the interlocutory applications. Trial dates have been fixed and rescheduled because of the appeals and the Covid-19 pandemic.

[27] Even though the O 14A r 1 of the ROC states that the application can be made at any stage of the proceeding, relying on the judgment in *Dayapi Holdings Sdn Bhd & Anor v Arab-Malaysian Finance Bhd & Anor* [2009] 7 MLJ 627 where it was held that as a matter of procedural law, the applicant could no longer invoke O 14A as the case had reached the final stage and had been set down for trial, the learned judge said that the application could be dismissed on this point alone.

[28] That aside, the learned judge was of the view that the four questions posed are not suitable to be determined summarily.

[29] Questions 1 and 2 involved the questions regarding the intention of the late WTS and CHC in their wills and the conduct of the plaintiff which will show his unsuitability or suitability to fulfil the intention of WTS and CHC as stated in the wills. The appellant's suitability as the candidate of the executorship of his parents' wills and that the circumstances surrounding his suitability or unsuitability was heavily disputed. Further, the issue of the applicability of the s 12(1) and the chain of executorship principle was unsettled and in dispute. This involved a question of a mixture of both facts and law. What was evident as disclosed in the pleadings, including the affidavits, was that there were too many factual disputes between parties that can only be resolved by having a full trial.

[30] Question 3 involved the entire circumstances surrounding the handwritten documents which involved factual disputes between parties as regards the meeting held on 29 November 2017. The meeting was a 'without prejudice' discussion between the appellant and the respondent to find an amicable way to resolve any disputes between the parties on the estates of WTS and CHC. The handwritten documents prepared was in fact subject to further terms and conditions to be finalised between the parties and contingent upon the execution of a formal agreement. Subsequent to the meeting, the parties were still exchanging three draft formal agreements. So long as the parties were still in discussions to resolve any ambiguity and to further discuss new/revised terms, there might exists no agreement to enforce between the parties. These matters are to be determined in a full trial.

[31] On question 4, the extent of reliefs sought by each party and against each other as can be seen from the re-amended SOC and re-amended counterclaim, necessitated a trial. Even if the questions are answered, it will not answer each and every relief/prayer sought. The large volume and the magnitude of factual allegations pleaded by the appellant in his re-amended SOC warrants a full trial for the court to make a final determination on the questions posed.

THE APPEAL

[32] The appellant presented 26 grounds in challenging the learned judge's decision. The appellant contended that the requirements for summary determination of the questions of law were present and satisfied, based on the relevant facts and circumstances of each case.

[33] In the present appeal, learned counsel for the appellant informed the court that the appellant was willing to proceed only with questions 1 and 2 and prepared to go for trial on question 3 and part of question 4.

[34] Learned counsel submitted if questions 1 and 2 were answered in favour of the appellant, part of question 4 that the court should allow:

(a) in Suit 417, were the reliefs in prayers 61 (a), (d), (e), (f), (g), (m), (n) and (o); and

(b) in Suit 418, were the reliefs in prayer 73 (a), (d), (e), (f), (g), (i), (j) and (k).

The other reliefs had to do with the settlement agreement the subject matter of question 3 and thus should be resolved at the trial.

[35] Learned counsel for the appellant further submitted that the whole case need not be disposed of. It is sufficient if a substantial matter can be disposed of. Learned counsel for the respondent took a different view, namely, if the four questions posed cannot fully and finally determine the entire proceedings, the application in encl 211 must fail. In addition, the respondent had filed a counterclaim.

[36] O 14A reads:

Determination of questions of law or construction (O 14A r1)

(1) The court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that —

(a) such question is suitable for determination without the full trial of the action; and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

(2) On such determination the court may dismiss the cause or matter or make such order or judgment as it thinks fit.

(3) The court shall not determine any questions under this Order unless the parties have had an opportunity of being heard on the question.

(4) The jurisdiction of the court under this Order may be exercised by a Registrar.

(5) Nothing in this Order shall limit the powers of the court under Order 18 rule 19 or any other provisions of these Rules.

[37] Granted that the appellant is now proceeding only on questions 1 and 2 and part of question 4, can O14A be taken in that way where it does not resolve all matters conclusively without a need for a trial? We agree with learned counsel for the appellant that there is room for the court to deal with any claim or issue in the suit as envisaged in O 14A r 1(1)(b) without the need to have the determination of the entire suit. If there is a particular claim or issue, which is significant and a dominant feature of the suit that can be disposed of without the need for trial, that particular claim or issue will qualify under O14A.

[38] It may be useful to briefly refer to the following excerpt from the *Malaysian Civil Procedure 2015* (Sweet & Maxwell) at p 130 on the principles governing the application of O 14A:

> The outcome of an application under O 14A does not need to dispose of the entire case. It is sufficient if substantial matters in the case can be disposed of: *Petroliam Nasional Bhd & Anor v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8; [2003] 5 AMR 696 ; [2003] 4 CLJ 337 (CA); *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2008] 2 MLJ 812; [2008] 1 AMR 105. The issue to be determined should be a core legal issue that may for practical purposes turn out to be determinative of the case; *Rockwin Enterprise Ltd v Shui Yee Ltd* [2003] 3 HKC 174 at p 184 *Netwell Properties Ltd v JCG Finance Co Ltd* [2003] 4 HKC 566, (CA) (HK).

[39] The Federal Court case of *Chong Chieng Jen v Government of State of Sarawak & Anor* [2019] 3 MLJ 300; [2019] 1 CLJ 329 is instructive on the issue at hand:

> [61] In *Kerajaan Negeri Kelantan v Petroliam Nasional Bhd and other appeals* [2014] 6 MLJ 31 at p 34; [2014] 7 CLJ 597 at p 600, this court held that the core issue as per the pleadings which was based on the breach of contract cause of action is whether the plaintiff has any rights over petroleum won and saved in the continental shelf off its coast. This core issue has been sufficiently addressed in the proposed questions or issues of law pursuant to O 14A, and it is clear that the outcome of the plaintiff's claim rested entirely on the determination of this core issue. Such determination, further, will be decisive as to the plaintiff's other causes of action (unfair discrimination, constitutional breaches and estoppel) considering that they are grounded on the underlying presumption that the plaintiff has the rights over petroleum located in the continental shelf off its coast. In that case the Federal Court also held that where the question of construction is a dominant feature of the case, the court should proceed to determine that issue, and that the whole case does not have to be disposed of. This is clear from the judgment of Abdul Hamid Embong FCJ delivering the judgment of the court at pp 20–21 (MLJ); pp 625–626 (CLJ):

> [38] The plaintiff's contention with regard to its rights over petroleum won and saved in the continental shelf off its coast in this case is based on the Kelantan petroleum agreement and the Kelantan grant which were entered into between the plaintiff and Petronas pursuant to the provisions of the PDA. Clearly, this issue is a question of law which can be resolved by reference and interpretation of the relevant legislations and contractual documentations without having to go for a full trial of the action. It is trite that where the question of construction is a dominant feature of a case, the court should proceed to determine that issue. It follows that the whole case does not have to be disposed of but it is sufficient if substantial matters can be disposed of (see *Korso Finance Establishment Anstalt v John Wedge (Unreported), 15 Feb 1994*, CA Transcript No 14/387).

[40] In light of the withdrawal of questions 3, we shall proceed to consider questions 1 and 2 and part of question 4.

ENCLOSURE 211

[41] In this application, the appellant contended that he relied not only on O 14A but also O 33 r 2 and/or r 5 of the ROC in framing the four questions.

THE SUITABILITY AND APPLICABILITY OF O 14A

[42] The test of whether the question of law or construction is suitable to be determined under O 14A was dealt with by the Federal Court in *Director of Forests, Sarawak & Anor v Racha ak Urud @ Peter Racha Urud & Ors and other appeals* [2017] 4 MLJ 42:

> [35] On the applicability and the approach to be taken by the court in exercising its powers and discretion under O14A, we refer to the commentary on O 14A appearing in the *Malaysian Court Practice* (Practitioner Edition), a publication of the Malayan Law Journal at pp 125–127 which reads as follows:
>
> > [14A.1.3.] Suitable question of law or construction. The question of law or construction must be suitable to be determined without the full trial of the action. The test of whether the question of law or construction is 'suitable' to be determined under this order is whether all the necessary and material facts relating to the subject matter of the question have been duly proved or admitted, and this postulates that there is no dispute or no further dispute as to the relevant facts at the time when the court proceeds to determine the question. The suitability of disposing of an action under this order depends entirely on whether the court can determine the question of law raised without a full trial of the action. For example see *Manganmal Jhamatmal Lalwani v NE Vickerama* [2001] 1 SLR 90 (where the plaintiff made an application for a ruling on the preliminary issue as to whether there was an issue of estoppel).
> >
> > In cases where all the relevant evidence is before the court, and where the point of law depends entirely on the construction of relevant documents in their context and it is not suggested that any further evidence could be available, it

would be appropriate for the question to be dealt with under O 14A rather than to allow it to go for trial (see *European Asian Bank AG v Punjab and Sind Bank* [1983] 2 All ER 508 at p 521, (CA)) (construction of letter of credit). For the law as to construction, see *Prenn v Simmonds* [1971] 3 All ER 237.

The question of law or construction to be determined by the court under this order should be stated or formulated in clear, careful and precise terms, so that there should be no difficulty or obscurity, still less any ambiguity or fictitious facts, about what is the question that has to be determined: *Allen v Gulf Oil Refining Ltd* [1979] 3 All ER 353. There must be no hypothetical or future facts: *Summer v william Henderson & Sons Ltd* [1963] 2 All ER 712, (CA) (no facts were agreed and what the outcome of the evidence was most uncertain). Where the issues of fact are interwoven with the legal issues raised, it will be undesirable for the court to split the legal and factual determination, for to do so would in effect be to give legal ruling *in vacuo* or on a hypothetical ruling, which the court will not do (see *State Bank of India v Marjani Marketing*, 1 March 1991, CA Transcript No. 9/0304).

The issue of law, if it is discernible at all, has to be discernible from the statement of claim and defence. If there could still be a debate as to whether on slightly different facts a cause of action might or might not exist, an application under O 14A *is inappropriate. the court should not be required to interpret the statement of claim to decide what point of law arises. An application under O 14A is to decide clear points of law or construction apparent on the pleadings* (see *Watson & Anor v Dutton Forshaw Motor Group Ltd & Ors* [1998] EWCA 3245, 22 July 1998, CA). (Emphasis added.)

[42] On the strength of the authorities cited, it is apparent that one primary task which must be undertaken by the court in deciding on the suitability and applicability of the order is to consider whether the pleadings disclose any dispute on the material facts. The order shall only apply where the material facts pleaded are obviously undisputed or which should not have been disputed.

[43] In *Thein Hong Teck & Ors v Mohd Afrizan bin Husain and another appeal* [2012] 2 MLJ 299, the Federal Court held that it was trite law that O 14A of the RHC could only be resorted to if there was no dispute by the parties as to the relevant facts or the court concluded that the material facts were not in dispute. In the present case there were serious disputed facts involved and these issues of fact were interwoven with the legal issues raised. As such, the Court of Appeal was correct in finding that O 14A of the RHC was not suitable for the purpose of determining the applicability of s 314 of the Act to the partnership in the present case.

FINDINGS OF THIS COURT

Delay

[44] In *Dayapi*, Mohamad Hishamudin J (as he then was) in *Dayapi*, held

the following:

> [33] It is true that r 1(1) contains the words '... at any stage of the proceedings ...' However, in my judgment, this phrase '... at any stage of the proceedings ...' cannot be given too literal an interpretation. Nor can it be read in isolation. Where the proceedings has already reached the trial stage, O 14 A must be read in conjunction with O 33, in particular, rr 2, 3 and 5 ...
>
> In my judgment, when the proceeding has reached such an advanced stage of the proceedings or had practically reached the trial stage, as has happened in the present case, the appropriate course to adopt , should any party be of view that the cause could be disposed of without the need of a normal trial, is not to invoke O 14A , but to invoke O 33 r 2, 3(2) and r 5 of the RHC.

[45] We agree with learned counsel for the appellant that the issue of delay is irrelevant as encl 211 made reliance not only on O 14A r 1 but also on O 33 r 2 and/or r 5 of the ROC where the application may be made either before, at or after the trial. In *Daud bin Arshad & Ors (representing 61 settlers/participants of FELCRA Gugusan Sungai Ara, Mukim Ulu Sungai Sedili, Daerah Kota Tinggi, Johor) v FELCRA Bhd* [2019] 2 MLJ 33, encl 68 was an application filed by defendant pursuant to O 33 rr 2 and 5 of the ROC for the determination of two issues, namely: (a) whether the plaintiffs' claim was time-barred; and (b) whether the plaintiffs were estopped from filing the suit by reason that they had accepted the impugned accounts as true and correct. The application was made after the case had proceeded to full trial where ten witnesses for the plaintiff had testified, after the plaintiff had closed their case and after the first witness for the defendant had completed his testimony. The learned judge allowed the defendant's application. The plaintiffs appealed. The Court of Appeal held that the decision of the learned judge was in accord with the provisions of O 33 r 2 of the ROC. Despite the fact that the trial had proceeded at such an advanced stage, the court ruled that it did not preclude the defendant from filing the said application.

[46] As to when an O 14A application can be made, in *Pentadbir Tanah Daerah, Pontian & Ors v Ossons Ventures Sdn Bhd* [2009] 6 MLJ 182, Zainun Ali JCA (as she then was) observed that an O 14A application may be made at any stage of the proceedings and even orally during the course of another interlocutory application and this means that it is not necessary to have an O 14A application formally drafted before the court before a party could invoke the provision of the law.

[47] In *Mohd Afrizan bin Hussain v Thein Hong Teck & Ors and another appeal* [2017] 4 MLJ 633, a decision by the Court of Appeal, the facts showed that in the High Court, prior to the commencement of trial, the plaintiffs applied by summons in chambers to summarily set aside the winding up order and the defendants on the other hand applied to strike out the plaintiffs' writ

and statement of claim. Instead of dealing with the parties' interlocutory applications, the learned High Court judge decided that the entire matter could be disposed of by way of O 14A of the Rules of the High Court 1980 by determining the two questions of law.

[48] Given the instances above, we opined that the O 14A application in encl 211 may be made at any stage of the proceedings. The learned judge should not have rejected the O 14A application by reason of delay. Even if the learned judge found that the O 14A was not the appropriate mode to pose the four questions, he still cannot reject encl 211 in light of the reliance made on O 33 rr 2 and 5.

[49] The learned judge had nevertheless proceed to consider the application of O 14A on its merits. We shall consider this appeal on similar basis.

Questions 1 and 2

[50] We are of the view that questions 1 and 2 raised significant issues which should be determined first and foremost. Issue of who is the executor must be resolved as soon as possible and should not be left floating if it can be resolved as a question of law on undisputed facts because the administration of the estates and the interest of the beneficiaries are at stake.

[51] It is common ground that the suits concerned the administration of CHC's and WTS's estate. In CHC's will and WTS's will, WWK was the instituted executor and the appellant was the alternative or substitute executor if WWK was unwilling or unable to act for whatsoever reason. It is not in dispute that the estates are not fully administered when WWK died. WWK appointed the respondent as the executor of his will. The respondent had extracted the grant of probate for WWK's estate. On WWK's passing, the appellant pleaded case is that he should then be the executor of his parents' estates as that was the intentions of the testators. The respondent claimed that he should be the one.

[52] It is apparent from the pleadings and also the affidavits that the competing interests between the appellant and the respondent relate to the question of who is to inherit the executorship pursuant to the wills of WTS and CHC following the passing of WWK. This hinges on the construction of cl 2 in the two wills and s 12 of Act 97.

[53] His Lordship too was mindful of the fact that questions 1 and 2 require the construction of the wills of WTS and CHC and s 12 of Act 97 as apparent in para 36 of his GOJ which stated to the following effect. That the crux of the matter was the question as to who to 'inherit' the executorship of the wills. Was

it the intention of WTS and CHC when they were alive to pass down the executorship to the plaintiff or would it be to the defendant by virtue of s 12(1) of Act 97 since WWK as the original executor had died and that the defendant being the executor for the late WWK.

[54] The learned judge however erred when he held, at the same time, that questions 1 and 2 involved mostly question of facts. The learned judge had placed much emphasis on the suitability of the appellant to be issued a grant of probate, which he thinks should be a matter for the trial (see also paras 38, 40 and 41). The 'suitability issue' was raised by the respondent in his SOD at para 25 (in Suit 417). Learned counsel submitted that the learned judge had the discretion in the granting of a probate pursuant to s 3(1) of Act 97 and hence, the issue of suitability came in.

[55] We agree with learned counsel for the appellant that the appellant's suitability as an executor and the conduct of the parties during WWK's administration of the estates of WTS and CHC are not relevant to the determination of question 1. The suitability of the appellant as the alternative executor was not a condition or additional requirement imposed by the testators in their wills. The learned judge had thus factored in irrelevant consideration.

[56] Turning back to question 1, the question posed is suitable to be determined under O 14A r 1 of the ROC as it is a question of law which turns on the construction of the wills of WTS and CHC and the determination of which does not depend on the factual dispute between the parties.

[57] Question 2 comes into play because WWK had died and the respondent raised the application of s 12 of Act 97 which allows a chain of representation. This question too is suitable to be determined under O 14A r 1 of the ROC as it concerns the construction of s 12 of Act 97. The material fact is not in dispute ie the appellant was named as the substituted executor of the estates of WTS and CHC in their wills.

[58] It is trite law that construction of documents is a question of law.

[59] In this regard, we refer to the House of Lord case of *Bahamas International Trust Co Ltd and another v Threadgold* [1974] 3 All ER 881, where it was held at p 884:

> In a case which turns, as this one does, on the construction to be given to a written document, a court called on to construe the document in the absence of any claim for rectification, cannot be bound by any concession made by any of the parties as to what its language means. This is so even in the court before which the concession is made; a fortiori in the court to which an appeal from the judgment of that court

A is brought. The reason is that the construction of a written document is a question of law. It is for the judge to decide for himself what the law is, not to accept it from any or even all of the parties to the suit; having so decided it is his duty to apply it to the facts of the cases. He would be acting contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be the law, if in his B own opinion it was erroneous.

[60] *Bahamas International Trust Co Ltd* was accepted with approval by the Court of Appeal in *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38. The headnote of the reported case showed the construction C a contract was a question of law for determination by the court and not by witnesses through their oral evidence. As the learned judge had referred to the oral testimony and relied upon it for the interpretation of the agreements and circulars, the Court of Appeal found that that was clearly an inadmissible method of construction. D

[61] In *Asiapools (M) Sdn Bhd v IJM Construction Sdn Bhd* [2010] 3 MLJ 7, the headnote shows:

(4) (per Abdul Malik Ishak JCA) In construing a written contract the professed E object of the court was to discover the mutual intention of he parties. The intention of the parties must be ascertained from the document itself. Thus, the parties themselves cannot give direct evidence to show that their intentions were at variance with the provisions of the contract document. The task of the court is quite simple namely, to construe the contractual term without any preconception as to what the F parties intended. When the minds of the parties are expressed in an unambiguous manner, the principles of construction which are at best only a guide in the search for the intention of the parties cannot be relied upon to override the declared intention of the parties unequivocally expressed in the contract document.

G **[62]** The construction of a document may not be suitable to be dealt as preliminary point if there are disputes on the factual matters. In *Federal Insurance Co v Nakano Singapore (Pte) Ltd* [1991] 2 SLR(R) 390, the Court of Appeal of Singapore held:

H The third ground of appeal was that the preliminary point raised by the appellants was concerned only with the construction of condition 8 of the policy and of the appellants' letter of repudiation. He referred us to *Gold v Patman & Fotheringham Ltd* [1958] 2 All ER 497 *and Yeoman Credit Ltd v Latter* [1961] 2 All ER 294 where questions of construction of documents were held suitable for determination as preliminary points of law. We agree that questions of construction are suitable for I decision as preliminary points. However, they may not be suitable if there are also disputes as to the 'factual matters' affecting the point of construction' (see *Atkin's Court Forms* Vol 23 (1988 issue)). It is a question of the degree or magnitude of these preliminary factual disputes in each case.

[63] Thus on the decided cases, it is clear that the construction of the wills of WTS and CHC in relation to question 1, is a question of law for determination by the court and not by witnesses through their oral evidence unless it can be shown that there are also disputes as to the 'factual matters' affecting the point of construction. We do not detect any factual matters affecting the point of construction. Given the aforesaid, it is our judgment that the High Court fell into an erroneous finding that questions 1 and 2 are not fit to be determined summarily without a trial. It was incumbent on him to determine question 1 by looking at the wills.

Construing CHC's and WST's will

[64] We shall now consider question 1.

[65] In construing a will, it is paramount that the court must give effect to the intention of the testator as expressed in the words of the will.

[66] In the Federal Court case of *Hsu Yik Chai v Hsu Yaw Tang & Anor* [1982] 2 MLJ 227; [1982] 1 MLRA 319, Lee Hun Hoe CJ (Borneo) explained the role of the court in interpreting a will:

> The purpose of construction is to give effect to the intention of the testator expressed in the words of the will. On that point we would only refer to what Lord Romer said in *Perrin v Morgan* [1943] AC 399 at p 420 and also quoted by the learned judge as follows:
>
> > My Lords, I take it to be a cardinal rule of construction that a will should be so construed as to give effect to the intention of the testator, such intention being gathered from the language of the will read in the light of the circumstances in which the will was made. To understand the language employed the court is entitled, to use a familiar expression, to sit in the testator's armchair. When seated there, however, the court is not entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not mean what he has plainly said ...

[67] In *Kalwant Singh a/l Ujagar Singh & Anor v Jaswant Kaur a/p Ujagar Singh & Ors* [2022] 3 MLJ 184; [2022] 4 MLRA 27, on the construction of will, Zabariah Mohd Yusof FCJ delivering the judgment of the court said:

> [37] The Federal Court in *Hsu Yik Chai v Hsu Yaw Tang & Anor* [1982] 2 MLJ 227; [1982] 1 MLRA 319, had the occasion to explain the role of the court in interpreting a will, namely to enable the testator's intentions. The circumstances in which the will was written would be taken into account, however, there is so much the court would do, as the court is still limited in giving effect to the testator's intentions in so far as they are written in the will. It should also be borne in mind that, in reading a person's will, the court will take the plain and obvious meaning of the testator's words (see *Tan Sri Dr M Mahadevan v Dr Jeyalakshmi Ratnavale &*

Ors ; [2017] 2 MLRA 237). From the aforesaid, if the will does not provide for the distribution of a particular property and there are no words in the will that could be interpreted to be a residuary clause, there is no way a court could assist in avoiding a case of partial intestacy. The court cannot read an intention in the will if it is not there.

[68] We reproduce cl 2 of the wills for reference:

CHC's will

> 2. I appoint as my executor my son Woo Wei Kwang NRIC No. 741006–14–5699 of No. 35, JALAN SS 1/36, 47300 PETALING JAYA, SELANGOR but if he is unwilling or unable to act for whatsoever reason, then I appoint my son WOO WEI LIANG NRIC No. 700311–10–6417 of No. 35, JALAN SS 1/36, 47300 PETALING JAYA, SELANGOR

WST's will

> 2. I appoint as my executor my son Woo Wei Kwang NRIC No. 741006–14–5699 of No. 35, JALAN SS 1/36, 47300 PETALING JAYA, SELANGOR but if he is unwilling or unable to act for whatsoever reason, then I appoint my son WOO WEI LIANG NRIC No. 700311–10–6417 of No. 35, JALAN SS 1/36, 47300 PETALING JAYA, SELANGOR

[69] Clause 2 of the CHC's will and WTS's will contained similar provisions.

[70] The position taken by the appellant is that in cl 2 the testators had devised a scheme of representation for one of their sons to administer their estates.

[71] In this context, learned counsel for the appellant referred us to a High Court case of Trinidad and Tobago *Mc Kenzie et al and Mc Kenzi* Cv No 4703 of 2010. We can safely say that the facts of this case are on all fours with the present case. In that case, the claimants, Osmond and Harvey Mc Kenzie are the two surviving sons of the deceased and are named as 'substituted' executors in the deceased's last will and testate dated 14 September 1990. Their brother, George W Mc Kenzie who was named as the first or 'instituted' executor, obtained a grant of probate but died on 16 June 2010 without completing the administration of the deceased's estate. The defendant, Mona Mc Kenzie is his wife and presently occupies the principal asset of the 990 will, a dwelling house and the family home (the said premises). She contends that as the executor of her husband's estate, she is entitled to continue the administration of Elvina's estate. The issue in that case was whether the person lawfully entitled to administer the estate of the deceased are the claimants named in order of priority in the 1990 will as the substituted executors and who are deemed to be substituted in that order of priority upon the death of the first executor, George Mc Kenzie or the defendant as the executor of the estate of George Mc Kenzie

and so continuing the chain of executorship. The clause appointing the executor in the 1990 will provided as follows:

> I nominate the following person or persons to serve as executor and trustee of this will, George Mc Kenzie, son. If this person is unable to serve, then I nominate the others to serve in the order I list them as follows:
>
> 1. Osmond O Mckenzie, son
> 2. Harvey H Mc Kenzie, son.

Kokaram J in that case came to the finding that the scheme devised by the deceased was for one of her three sons to administer this estate. They are the three named as the executors in different degrees. The learned judge said he could not see any other preferred scheme as intended by the testator except that the substituted executors will serve in the event of the death of the instituted executor.

[72] *Mc Kenzie* is not binding but it lends support to the appellant's case. On the facts, we would have come to the same conclusion as did the learned judge in that case. In the present appeal, the language in cl 2 is plain, simple, clear and unambiguous. The language used certainly does not permit several construction of the words. It refers specifically to who are to be the executors of the testators' respective estates. In the circumstances, this court must give the words in cl 2 their natural and ordinary meaning to enable the testator's intentions (see *Tob Weng Keong & Anor v Tob Chee Hoong* [2019] MLJU 1435; [2019] 10 CLJ 150) and *Kalwant Singh Ujagar Singh*). Clause 2 must be construed to be an express declaration of the intention by CHC and WST to appoint WWK as the instituted executor and the appellant as the substituted executor if WWK was unable to act for whatever reason. The words in cl 2 'or unable to act for whatsoever reason', in our view include the death of WWK. So when WWK died, the intention of the testators that they wanted their other son, the appellant, to be the substituted executor, must be put into effect. There can be little doubt that when the testators made the wills, they both had in mind their sons as the executors and had intended to devise a scheme of representation among their sons, to appoint only their sons to administer their estates and nobody else.

[73] Learned counsel for the appellant referred us to the New Zealand High Court case of *Re Estate of CLAMP (dec'd)* [2014] NZHC 540 to support his contention that when WWK died, the condition for the appointment of the appellant had arisen and had been satisfied. The headnote of the reported case showed the following. Mr Clamp left a will appointing his wife executrix. The will appointed a substitute executor, Mr Armstrong, in the event that Mrs Clamp failed to make application for or to obtain a probate. Mrs Clamp was not capable of managing her own affairs and was subject to orders under the Protection of Personal and Property Rights Act 1988. She did not apply for

probate. Mr Armstrong did. The Registrar considered that Mrs Clamp's statutory property manager should apply for probate and refused to grant probate on the basis that the condition of Mr Armstrong's appointment had not arisen. Mr Armstrong had applied for a review of that decision. Mackenzie J in setting aside the decision of the Registrar held that on the plain words of the will, the testator had intended that the substituted executor should be appointed if the instituted executor failed to apply for probate. The words of the will did not require that the instituted executor renounce probate or overtly refuse to apply for it. Neither was there a provision for a property manager to be substituted should the instituted executor become incapacitated. As the instituted executor had failed to apply for probate the only pre-condition to the appointment of the substituted executor had been satisfied.

[74] We think *Re Estate of Clamp* too support the appellant's case. The condition for the appellant's appointment had arisen and had been satisfied. The testators did not impose any additional condition or requirement for the appointment of the appellant, including his suitability as a candidate for the grant of probate, to be the substituted executor if WWK was unable to act for whatsoever reason. The only condition for the appellant's appointment to arise is if WWK was unable to act for whatever reason. We reiterate that the words 'unable to act for whatsoever reason' include the death of WWK. Thus, cl 2 should not be interpreted in a sense different from which they bear (see *Tob Weng Keong*).

[75] We disagree with learned counsel for the respondent that the naming of the appellant as the substituted executor does not automatically translate into his suitability to assume such role to manage the estates of CHC and WTS. The position taken by the respondent is clearly against the clear and express intention of CHC and WST in their wills. To adopt the construction of para 2 of the wills in the manner suggested by the respondent, would be tantamount to re-writing the wills (see *Tob Weng Keong*).

[76] Question 1 is therefore answered in the affirmative. In light of our decision in question 1, question 2 is no more relevant. We proceed however, to answer briefly the question for purposes of completeness.

Construing s 12 of Act 97

[77] Section 12 of Act 97 reads —

> 12(1) An executor of a sole or last surviving executor of a testator is the executor of that testator:
>
> (2) Provided that this provision shall not apply to an executor who does not prove the will of his testator, and, in the case of an executor who on is death leaves

surviving him some other executor of his testator who afterwards proves the will of that testator, it shall cease to apply on probate being granted.

So long as the chain of representation is unbroken, the last executor in the chain is the executor of every preceding executor.

(3) The chain of representation is broken by —

(a) an intestacy;

(b) the failure of a testator to appoint an executor; or

(c) the failure to obtain probate of a will,

but is not broken by a temporary grant of administration if probate is subsequently granted.

(4) Every person in the chain of representation to a testator —

(a) has the same rights in respect of the estate of that testator as the original executor would have had if living; and

(b) is, to the extent to which the estate of that testator has come to his hands, answerable as if he were an original executor.

[78] For the respondent to claim the application of s 12(1) of Act 97, the respondent must show that WWK was the sole or last surviving executor of CHC's will and WTS's will. WWK however, was not the sole or last surviving executor of the testators. CHC's will and WTS's will provides for the appointment of the appellant as a substituted executor. And the appellant in this case, as apparent from his pleadings, is willing and able to act as the substituted executor. Thus, the learned judge erred when he held in para 42 of his GOJ that the issue of the applicability of the s 12(1) and the chain of executorship is unsettled and in dispute.

[79] We agree with learned counsel for the appellant that so long as there is a clear scheme of representation, as present in this case, that scheme of representation must be given effect to and shall prevail over any claim for chain of representation. In any event, the respondent cannot rely on s 12 as it is not applicable here.

[80] Question 2 is answered in the negative.

CONCLUSION

[81] We allow the appeal in part and make the following order pertaining to encl 211:

(a) question 1 is answered in the affirmative;

(b) question 2 is answered in the negative;

(c) question 3 is remitted to the High Court for trial;

(d) as regard question 4:

(i) in Suit 417, we only allow the reliefs in prayers 61 (a), (d), and (e). In relation to prayers 61(f), (g), (m), (n) and (o), as the matters come under the purview of the said court, it is for the appellant to take such necessary action as the appellant deems fit in the Probate Court;

(ii) in Suit 418, we only allow the reliefs in prayer 73 (a), (d) and (e). In relation to prayers 73 (f), (g), (i), (j) and (k), we make similar order for similar reliefs sought in Suit 417; and

(iii) other reliefs in Suits 417 and 418 are remitted to the High Court for trial.

(e) costs of RM15,000 here and below to be paid to the appellant.

Appeal allowed in part.

Reported by Nabilah Syahida Abdullah Salleh